APPENDIX

Final opinion of Illinois Supreme Court rendered March 21, 1945, in the case in which certiorari is sought, Martin v. Schillo, —— Ill. —— (not yet reported):

Mr. Justice Stone delivered the opinion of the court:

The suit out of which this present controversy grew was filed in the Superior Court of Cook County by appellant Edward H. S. Martin as plaintiff, for an accounting and recovery of attorney's fees claimed due him. The appellees, Marian Schillo, Adele Schillo and Dorothy S. Fischer were made defendants. No personal service was had and on May 16, 1942, Martin filed an affidavit for attachment claiming $2655 to be due him. Notice was given by publication and mailing. Writ of attachment was issued and levied upon the real estate in the city of Chicago involved in this proceeding and owned by the three named defendants as tenants in common.

On August 5, 1942, the trial court found it had jurisdiction of the subject matter and the parties, entered a default judgment for the amount claimed and a special execution was issued on that judgment. On September 15, 1942, the attached real estate was sold by the sheriff for the amount of plaintiff's claim and costs, and the sheriff issued his certificate to Grace B. Martin, wife of the plaintiff. On December 18, 1943, the period of redemption having expired, a sheriff's deed was issued conveying four-fifths of the attached real estate to Grace B. Martin and one-fifth to Celia King, wife of plaintiff's attorney. On February 28, 1944, the defendants in the attachment suit, appellees here, filed a sworn petition seeking to set aside the judgment in attachment, execution, sale and sheriff's deed, on the ground, among others, that the affidavit for attachment was not sufficient to give the court jurisdiction of the subject matter, and that Marian Schillo did not receive a copy of the notice because, as the returned envelope shows, it was mailed to the wrong address, and that for these reasons the judgment was void and all proceedings had thereunder should be set aside. This sworn petition also averred that

the defendants, appellees, did not learn of the judgment, sale of and deed to their real estate until on or about December 30, 1943, some fifteen days after the period of redemption from the sheriff's sale had expired, and that they were nonresidents, residing in Philadelphia. They state further that they immediately came to Chicago, retained counsel, prepared and filed their petition referred to.

Grace B. Martin and Celia King were made parties defendant to the petition by reason of their claimed interest in the real estate and O. H. Knecht Company, a corporation, was made party as the one collecting the rentals from the real estate as the agent of Grace B. Martin and Celia King. Notice of the petition was also served on appellant Martin.

A trial was had before the court upon the pleadings and record and the court held the judgment, sale and deeds null and void on the ground that the court did not have jurisdiction of the subject matter nor of the parties in the attachment suit. The question involved on this appeal is whether such is a correct holding. It is claimed by appellants here that the trial court did have jurisdiction in the attachment suit, hence the judgment of the court in the present proceeding is erroneous. If the trial court in the attachment suit did not have jurisdiction of the subject matter, its judgment in that suit was void and without any effect and may be questioned at any time or place. (*Chicago Title and Trust Co.* v. *Mack*, 347 Ill. 480; *Steenrod* v. *Gross Co.*, 334 Ill. 362; *Armour Grain Co.* v. *Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Co.*, 320 Ill. 156.) Jurisdiction of the subject matter is always conferred by law. *Smith* v. *Herdlicka*, 323 Ill. 585; *People ex rel. Dorris* v. *Ford*, 289 Ill. 550; *Oakman* v. *Small*, 282 Ill. 360.

Attachment proceedings are statutory. To give the court jurisdiction of the subject matter and the parties the statute must be strictly complied with. Appellees say this was not done in this case for two reasons: (1) The affidavit for attachment was in the alternative and therefore insufficient in law to confer jurisdiction of the subject matter, and (2) the record shows on its face that notice was not mailed to Marian Schillo at the address stated in the affidavit, therefore the court did not obtain jurisdiction of her person, and

the judgment being a joint judgment against the three defendants and being void as to her, it is void as to all defendants.

Attachment was unknown at the common law and, being a statutory proceeding, the affidavit required by the statute for the writ must meet all the essential requirements of the statute to give the court jurisdiction of the subject matter. (*Rabbitt* v. *Weber & Co.*, 297 Ill. 491; *Thormeyer* v. *Sisson*, 83 Ill. 188; *Pullian* v. *Nelson*, 28 Ill. 112; *Eddy* v. *Brady*, 16 Ill. 306.) If an essential element of the affidavit is omitted, it may not be aided by amendment, and the proceeding is without authority of law. A judgment entered when the record on its face shows want of jurisdiction is void and of no force or effect. (*Rabbitt* v. *Weber & Co.*, 297 Ill. 491; *Booth* v. *Rees*, 26 Ill. 45.) The rule also is that a purchaser, whether he be a party to the record or a stranger, and all subsequent titleholders are chargeable with notice of the condition of the record and are not protected from the consequences of purchasing under a void judgment or decree. *Rabbitt* v. *Weber & Co.*, 297 Ill. 491; *Morris* v. *Hogle*, 37 Ill. 150.

Section 1 of the Attachment Act, (Ill. Rev. Stat. 1943, chap. 11, par. 1), so far as applicable here, is as follows: "That in any court of record having competent jurisdiction, a creditor * * * may have an attachment against the property of his debtor, or that of any one or more of several debtors, either at the time of instituting the suit or thereafter, when the claim exceeds $20, in any one of the following cases: First: Where the debtor is not a resident of this state. Second: When the debtor conceals himself or stands in defiance of an officer, so that process cannot be served upon him." The affidavit for attachment in this case avers: "said Marian Schillo and Adele Schillo are not residents of this state, or conceal themselves so that process cannot be served upon them, or have departed from this state with the intention of having their effects removed from this state, or are about to remove their property from this state, to the injury of said plaintiff, or have, within two years prior to the filing of this affidavit, fraudulently concealed or disposed of their property so as to hinder and delay their creditors."

It has been held that the disjunctive use of grounds for attachment may be made when such disjunctive averments refer to the same subject matter and are in a sense the expression of but a single ground. (*McCarthy Bros. Co.* v. *McLean County Farmers Elevator Co.*, 18 N. D. 176, 118 N. W. 1049; Shinn on Attachments, 145, p. 137.) But such an affidavit is held not good where the disjunctive averments include other and inconsistent grounds, such as appear in the affidavit here involved, relating to residence or non-residence of a defendant, or that they are concealing themselves, on the one hand, and that they are about to remove their property or have disposed of their property, on the other.

As early as 1859, in *Dyer* v. *Flint*, 21 Ill. 80, it was held that an affidavit for a writ of attachment must allege positively and unequivocally the requirements of the statute. It is not sufficient that such allegations be made on information and belief.

In *Archer* v. *Claflin*, 31 Ill. 306, it was held that the affidavit for attachment in that case was defective in its failure to aver in positive terms the design to depart from the State with intention of taking the defendants' property out of the State to the injury of their creditors. That such averments be positive is necessary to compliance with the statute.

In *Cronin* v. *Crooks*, 143 N. Y. 352, 39 N. E. 268, the warrant of attachment stated two grounds disjunctively. In affirming a judgment vacating the warrant of attachment and directing delivery of the property, that court said: "The provisions of Section 641 of the Code of Civil Procedure were not complied with. They provide, among other things, that the warrant 'must briefly recite the ground of attachment.' This warrant stated no ground, for to state in the alternative is to state neither the one nor the other fact. Such an alternative statement of grounds results in a mutual exclusion." In *Pierce* v. *Boyle*, 242 Mich. 149, 218 N. W. 756, it was held that an affidavit upon which attachment was issued, which stated grounds in the alternative, was fatally deficient. To the same effect are *Alvey* v. *Smith*, 28 S. W. 2d (Tex. Civ. App.) 267; *Heaton* v. *Panhandle Smelting Co.*, 32 Idaho 146, 179 Pac. 510; *Rosenberg* v. *Bul-*

lard, 127 Cal. App. 315, 15 Pac. 2d 870. See, also, 7 C. J. S. 296.

It is readily seen that the affidavit before us does not state which of the grounds therein set out is relied upon to sustain the attachment, and such cannot be ascertained. No positive statement is made whether Marian and Adele Schillo were nonresidents, or concealed themselves so that summons could not be served upon them, or whether they had departed from the State with the intention of having their effects removed from the State, or had within two years fraudulently disposed of their property.

The authorities cited all held that to state separate and distinct grounds for writ of attachment in the alternative or disjunctive is not sufficient to give the court jurisdiction of the subject matter of the attachment for the reason that the affidavit does not positively state any ground.

Attachment is an action *in rem*, a statutory remedy. It is necessary, in order to give the court jurisdiction of the property sought to be attached, that the requisites of the statute be substantially complied with. If there be no such compliance, the court has no jurisdiction of the subject matter, without which any judgment entered pursuant to the levy made under authority of the writ of attachment is void and of no force. In the record before us, we can but conclude that the trial court did not err in sustaining appellees' first objection to the jurisdiction of the court in the attachment suit. This view renders it unnecessary to discuss other points raised. Since the judgment for $2655 was procured on substituted service, it alone cannot stand. The judgment and proceedings had thereunder, including the deeds issued under the attachment and sale by the sheriff, were void. The judgment of the Superior Court is affirmed.

Former opinion of the Illinois Supreme Court in said suit, rendered November 22, 1944, (not reported), vacated by allowance of rehearing:

Mr. Chief Justice Fulton delivered the opinion of the court:

The questions here presented arise upon an appeal from an order of the Superior Court of Cook county which set

aside a default judgment in an attachment suit and declared the special execution, levy, sale and sheriff's deed of the attached real estate void and of no effect. The appeal comes directly to this court inasmuch as a freehold is involved. *Rabbitt* v. *Weber & Co.*, 297 Ill. 491.

No testimony was introduced in the trial court but the case rests entirely on pleadings or matters of record, whereby there is no dispute as to the facts, which may be summarized as follows. This suit was originally commenced by Edward H. S. Martin, as plaintiff, for an accounting and recovery of attorney's fees claimed by him to be due for professional services performed in connection with the sale or attempted sale of certain stock in an estate inherited by defendants, Marian Schillo, Adele Schillo, and Dorothy S. Fischer. Apparently, personal service could not be obtained upon the defendants, so, on May 15, 1942, plaintiff filed an amendment in the form of an affidavit for attachment against the same three defendants. Said affidavit claimed the sum of $2655 to be due and a writ of attachment was thereupon issued and levied on certain real estate in the city of Chicago, Illinois, then owned by said three defendants as tenants in common. No personal service was had upon any of the defendants, but plaintiff filed an affidavit of non-residence as to defendants Marion Schillo and Dorothy S. Fischer, and further swore that defendant Adele Schillo was either a nonresident or concealed herself within the State so that service could not be had upon her.

This constructive service was attempted to be completed by publication of the required notice and the mailing of copies to the addresses of defendants as given in plaintiff's affidavit of nonresidence. On August 5, 1942, a default judgment in the full amount claimed was entered against the three defendants, the trial court finding that defendants had been duly notified of the pendency of the suit by publication of notice and the mailing of a copy to each. A special execution was issued on this judgment, and on September 15, 1942, the attached property was sold by the sheriff, his certificate being issued to Grace B. Martin, wife of the plaintiff. After the period of redemption, the sheriff's deed was issued December 18, 1943, and purported to convey the attached real estate, four-fifths to the same Mrs. Martin and

one-fifth to Celia King, the wife of the attorney for plaintiff.

On February 28, 1944, a sworn petition in this same attachment suit was filed by said Marian Schillo, Adele Schillo and Dorothy S. Fischer (whom we will hereinafter refer to, collectively, as appellees), in which they alleged that they had first learned on or about December 30, 1943—fifteen days after the expiration of the period of redemption from the sheriff's sale—of the attachment judgment and of the sheriff's sale and deed of their real estate; that they were then in Philadelphia and two of them immediately came to Chicago, retained counsel and filed the petition, after having first obtained leave of court on February 16, 1944

After summarizing the proceedings as above outlined, the petition incorporated the entire record of the case up to that time by reference, attached a copy of the sheriff's deed as an exhibit, and alleged that the judgment sale and deed were void for the following reasons:

(1) That in the affidavit for attachment the alleged grounds were stated in the alternative rather than separately and independently, whereby the affidavit was not sufficient to give jurisdiction over appellees.

(2) That although plaintiff's affidavit of nonresidence stated that the last known place of residence of Marion Schillo to be "353 W. 57th Street, New York City, New York," it appears from the clerk's certificate of mailing that the notice was, in fact, mailed to her at "353 W. 47th Street, New York City, New York," and was subsequently returned to the clerk undelivered and unopened. That, accordingly, jurisdiction was not obtained as to said Marion Schillo and the judgment, being void as to her, is entirely void as to all appellees.

(3) That the publication notice recites the issuance of the writ of attachment from the clerk's office but does not state that the return was executed and returned by the sheriff, as required by statute.

(4) That the property was sold as a whole by the sheriff without separation of the interests of appellees and without

regard to the fact that the court had no jurisdiction over some or all of them, and, therefore, no right to levy upon their interests jointly.

Appellees' petition also asked that said Grace B. Martin and Celia King be brought before the court because of their interests in the real estate through the sheriff's deed, and that O. H. Knecht Company, a corporation, be made a party inasmuch as it was collecting rentals from the real estate on behalf of Mrs. Martin and Mrs. King. That was done and notice of the petition was duly served on the additional parties, as well as the original plaintiff, Edward H. S. Martin.

The trial court held that, in view of the matters set forth in appellees' objections (1) and (2), the court originally acquired no jurisdiction over the persons or property of the appellees and, hence, the judgment, sale and deed were null and void. To reverse that judgment this appeal is taken by Edward H. S. Martin, Grace B. Martin and Celia King, whom we will refer to, collectively, as appellants.

Inasmuch as we are fully satisfied that the second objection of appellees above set forth is well taken, and, alone, sufficient to sustain the judgment of the trial court, we will hereafter direct our attention to that point, only. The decisive character of the objection is, in fact, conceded by appellants by the statement in their reply brief that "if it appeared of record that her (Marion Schillo's) correct address was known and no other copy was mailed her at the later address, a judgment against her would be void for want of jurisdiction." Appellants argue, however, that whatever else might appear in the record as to the address where Marian Schillo's notice was mailed, the same is overcome by the finding of the trial court, when it entered judgment for $2655, that "defendants * * * have been duly notified of the pendency of this suit by publication of notice and by mailing a copy of same to each of them pursuant to statute in such case made and provided * * *." In other words, appellants contend that the certification of the clerk that he, in fact, mailed a notice to the wrong address of Marian Schillo, and the appearance in the record

of the sealed envelope containing said notice returned to the clerk undelivered and unopened, must give way to the finding of the trial court, in entering its money judgment, that notice was properly mailed and that the court thus had jurisdiction of the parties to the suit. As already indicated, we cannot agree with such contention because of the very obvious wording of the statute involved and previous decisions of this court upon the same or related questions.

Section 22 of our Attachment Act (Ill. Rev. Stat. 1943, chap. 11, par. 22,) provides for notice by publication when the defendants are nonresidents or cannot be found for process, and concludes as follows: "And such clerk shall, within ten days after the first publication of such notice, send a copy thereof by mail, addressed to such defendant, if the place of residence is stated in such affidavit; and the certificate of the clerk that he has sent such notice in pursuance of this section, shall be evidence of that fact."

Because of our constitutional guaranties of due process, it has always been held by the courts of this State that any statute providing for substituted or constructive service must be strictly complied with. Thus, in *Illinois Valley Bank* v. *Newman*, 351 Ill. 380, where an affidavit for service by publication was held insufficient, it was said: "A party claiming the benefit of a decree upon constructive service must show a strict compliance with every requirement of the statute, and nothing else will invest the court with jurisdiction or give validity to a decree when the same is called in question in a direct proceeding. (*People* v. *Abraham*, 295 Ill. 582; *Boyland* v. *Boyland*, 18 id. 551.) The affidavit upon which service by publication is had under the provisions of the Chancery act is jurisdictional and there must be a strict compliance with the statute." In *Anderson* v. *Anderson*, 229 Ill. 538, the identical question presented in this case was disposed of as follows: "The statute required the clerk, within ten days of the first publication of notice, to mail a copy to the defendant at his last known residence, as stated in the affidavit. (4 Starr & Cur. Stat. 905.) The place stated in the affidavit was 5559 State Street, Chicago, while the notice mailed by the

clerk was sent to 5857 State Street. This was not sufficient to confer jurisdiction."

Notwithstanding the decision just cited, appellants again point to the finding of jurisdiction in connection with original entry of judgment for $2655, and contend that, in view thereof, it must be presumed that the clerk later sent another notice to Marian Schillo's correct address. In support of this proposition, appellants cite several cases to the effect that a finding of jurisdiction cannot be collaterally attacked inasmuch as such recital in a decree implies that the statute was complied with. The answer to this contention is twofold. In the first place, the record contains only one certification of the clerk, which is that he mailed the publication notice to Marian Schillo at what is admittedly the wrong address. Certainly, if the clerk had subsequently mailed another notice to the correct address, he would have so certified in accordance with his duty under the statute. Appellants made no proof that the clerk mailed a second notice to the correct address, and, in the face of the plain certification of the clerk to the contrary, we see no license whatever for presuming to the contrary upon this very important point of fact and procedure. Presumptions cannot be indulged in against positive facts. The second answer lies in the proposition that this is not a collateral proceeding, as urged by appellants, but is a direct attack in that the petition to avoid the judgment is filed for that very purpose in the same action. On this point, it was said in *City of DesPlaines* v. *Boeckenhauer*, 383 Ill. 475: "A direct attack on a judgment is a proceeding instituted for the very purpose of avoiding or correcting a judgment in some particular and is brought in the same action and in the same court. (34 C. J. 520.) In *Dennison* v. *Taylor*, 142 Ill. 45, it was said: 'The judgment of a court is collaterally assailed when it is sought to be impeached in an action other than that in which it was rendered.' See also *Reizer* v. *Mertz*, 223 Ill. 555; *Long* v. *Thompson*, 60 Ill. 27, and *Moore* v. *Neil*, 39 Ill. 256. A direct attack may be made by motion or petition, as in this case, filed in the same cause in which the original judgment was entered."

It follows that the cases cited by appellants as to invulnerability of a decree when collaterally attacked have no

bearing on the issue here at hand. Even in a collateral proceeding a presumption in favor of jurisdiction will not stand when the facts of the record show to the contrary. For example, in *Sharp* v. *Sharp*, 333 Ill. 267, we held: "In case of collateral attack a presumption in favor of the regularity and validity of the decree is indulged from a statement in the decree that the court had jurisdiction of the subject matter and of the parties. Nothing will be presumed, however, in favor of jurisdiction in the face of facts appearing in the mandatory record showing that it did not exist * * * and where the record shows the evidence upon which the court acted is insufficient, the finding of the court in favor of jurisdiction is not conclusive."

A further contention is made by appellants that appellees were guilty of *laches* in not sooner moving to vacate the judgment in question. With this we cannot agree, because, in the first place, it is quite apparent that appellees used all due diligence by filing their petition within a month and one-half after they first learned of the attachment and sheriff's sale. To come from another State, obtain counsel and investigate these proceedings, could not have been done much faster in the ordinary course of affairs. Furthermore, as was stated in *Thayer* v. *Village of Downers Grove*, 369 Ill. 334: "It is a rule well established that a void judgment or order may be vacated at any time and the doctrines of *laches* and estoppel do not apply."

Finally, it is contended by appellants Grace B. Martin and Celia King that their title acquired at the sheriff's sale cannot now be attacked, because they were innocent purchasers for value. Without pausing to determine whether said appellants were, in fact, innocent purchasers for value, there is a conclusive answer in that this was simply a judicial sale where the rule of *caveat emptor* applies and the purchasers are not protected in their title by any statute. Thus, in *Rabbitt* v. *Weber & Co.*, 297 Ill. 491, where the same question was raised in a suit to set aside a deed issued in an attachment suit, we held: "In this case the person who purchased at the sale is the one who made the affidavit and had notice of its contents, and cannot be said to have occupied the relation of a stranger relying upon the judgment, whether he purchased for himself or for his client.

If he should be regarded as a stranger to the record the law presumes that all men inspect public records through which a title is derived before purchasing, and on failure to do so the law will not protect a purchaser from the consequences of purchasing under a void decree." To the same effect, see *Hutson* v. *Wood*, 263 Ill. 376.

To justify the action of the trial court in vacating the original judgment and declaring the sale and deed void in their entirety, appellees point out that if the defects in the proceedings were sufficient to deprive the court of jurisdiction over any of the appellees, the judgment is void as to all of them. Under the circumstances, this appears to be the rule applicable here, in view of cases such as *Fredrich* v. *Wolf*, 383 Ill. 638, wherein we recently set aside a confession judgment against one defendant because the other signature to the note was not genuine. Our conclusion there was by force of the following argument: "The rule has been long established that if a judgment entered as a unit against two or more defendants is so defective as to necessitate its vacation as to one defendant, it must be set aside as to all. (*Claflin* v. *Dunne*, 129 Ill. 241.) Plaintiff concedes this principle of law but refers to section 50 of the Civil Practice Act as authorizing a procedure of severing a judgment as to two or more defendants. Section 50 provides for the entry of a judgment for or against one or more of several plaintiffs and for or against one or more of several defendants, but there is no authority in that section which authorizes the setting aside of a unit judgment as to one defendant and permitting it to stand as to another. * * * After a judgment has been set aside and a new trial granted, separate judgments may then be entered against the several defendants pursuant to section 50, but when it has been entered as a unit to all the defendants, it stands or falls as to all." Likewise, in *Claflin* v. *Dunne*, 129 Ill. 241, a judgment was entered against several defendants, one of whom was dead. The motion to set aside the judgment as to all defendants was sustained by this court because of the same rule. It was a unit as to all defendants, and, being erroneous as to one, was erroneous as to all. The original money judgment herein, being void for lack of jurisdiction over the person of at least one joint defendant, the resulting

sheriff's sale and deed are likewise void and of no effect.

For the reasons hereinabove expressed, the judgment must be affirmed.

Certain Portions of Illinois Attachment Act, Ch. 11, Illinois Revised Statutes

"§ 2. Affidavit-Statement-Examination under oath

To entitle a creditor to such a writ of attachment, he or his agent or attorney shall make and file with the clerk of such court, an affidavit setting forth the nature and amount of the claim, so far as practicable, after allowing all just credits and set-offs, and any one or more of the causes mentioned in the preceding section, and also stating the place of residence of the defendants, if known, and if not known, that upon diligent inquiry, the affiant has not been able to ascertain the same together with a written statement, either embodied in such affidavit or separately in writing, executed by the attorney or attorneys representing the creditor, to the effect that the attachment action invoked by such affidavit does or does not sound in tort, also a designation of the return day for the summons to be issued in said action. * * * As amended 1935, July 10, Laws 1935, p. 210, § 1; 1939, July 19, Laws 1939, p. 289, § 1."

"§ 22. Notice by publication and mail

When it shall appear by the affidavit filed or by the return of the officer, that a defendant in any attachment suit is not a resident of this State, or the defendant has departed from this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him, and that property of the defendant has been attached, or that persons having such property or effects, choses in action or credits belonging to defendant, or owing debts to him, have been summoned as garnishees, it shall be the duty of the clerk of the court in which the suit is pending to give notice, by publication at least once in each week for three weeks successively, in some newspaper pub-

lished in this State, most convenient to the place where the court is held, of such attachment or garnishment, and at whose suit, against whose estate, for what sum, and before what court the same is pending, and that unless the defendant shall appear, give bail, or plead within the time limited for his appearance in such case, judgment will be entered, and the estate so attached or garnisheed sold or otherwise disposed of as provided by law. And such clerk shall, within ten days after the first publication of such notice, send a copy thereof by mail, addressed to such defendant, if the place of residence is stated in such affidavit; and the certificate of the clerk that he has sent such notice in pursuance of this section, shall be evidence of that fact. (As amended 1935, July 10, Laws 1935, p. 210, § 1.)"